

No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

LEONARD M. ROSS,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES,
Respondent,

LYNN B. STITES AND STITES
PROFESSIONAL LAW CORPORATION,
Real Parties in Interest.

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF CALIFORNIA**

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QUESTION PRESENTED

When a federal court determines that under state law, a state-courts judgment is res judicata, may the state court then refuse to accord the federal judgment full faith and credit, and deny that judgment preclusive effect in the state-court proceeding, thereby allowing relitigation of a controversy that the federal court determined to be fully and finally adjudicated?

PARTIES TO THE PROCEEDING

Petitioner, Leonard M. Ross, is a defendant, cross-complainant and cross-defendant in the Los Angeles County Superior Court and was a petitioner in both the California Court of Appeal, Second District and the Supreme Court of the State of California. The Superior Court of the State of California for the County of Los Angeles, respondent here, was the respondent in both the California Court of Appeal, Second District and in the Supreme Court of the State of California. Lynn B. Stites and Stites Professional Law Corporation are the real parties in interest in this proceeding.



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Leonard M. Ross petitions for a writ of certiorari to review the order of the Supreme Court of the State of California rendered in this case on May 3, 1989.

OPINIONS BELOW

The order of the Supreme Court of the State of California denying review after judgment by the California Court of Appeal, Second Appellate District (App 5a) is unreported. The California Supreme Court issued no opinion in support of that order. The summary denial of the petition for writ of prohibition or mandate of the

California Court of Appeal, Second Appellate District (App 6a) is also unreported. The Los Angeles County Superior Court's ruling denying petitioner's motion for judgment on the pleadings (App 8a) is likewise unreported.

JURISDICTION

The order of the Supreme Court of California denying the petition for review was entered May 3, 1989. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

STATEMENT OF THE CASE

A. Introduction

As a general matter, the law of federal supremacy, as well as California law, require the courts of California to accord full faith and credit to federal judgments and to give such judgments res judicata and collateral estoppel effect.

It is well established that a party may plead a federal judgment as res judicata and if the state court fails to accord it full faith and credit, may appeal through the state courts and seek review by certiorari in the Supreme Court. *Angel v. Bullington*, 330 U.S. 183, 186, 67 S.Ct. 655, 91 L.Ed 832 (1947); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L.Ed. 100 (1941). The issue presented in this case is whether a California state court may refuse to give full preclusive effect in ongoing state court proceedings to a federal court judgment, which characterized an existing state court judgment (in the same case) as "res judicata" over claims arising from the "very same occurrences." This issue, which does not appear to have been squarely addressed by any California Court, goes to the heart of the inter-relationship between state and federal courts and the deference a state court must give to a judgment rendered by a federal court under the principles of full faith and credit.

Real Parties in this case, Lynn Boyd Stites and Stites Professional Law Corporation, filed a lawsuit in federal court and two separate cross-complaints in this Action in which they asserted, under various legal theories, the same right to recover attorneys' fees from Petitioner. A judgment of dismissal was entered in this consolidated state action with respect to one of Real Parties' cross-complaints for attorneys' fees. That judgment was affirmed by the Second District Court of Appeal after granting an alternative writ. The Ninth Circuit Court of Appeals then upheld the earlier dismissal of Real Parties' federal court complaint on the ground that the dismissal of Real Parties' cross-complaint for attorneys' fees in this action constituted a res judicata bar to *any* claim by Real Parties for the recovery of attorneys' fees from Petitioner. (App 1a)

Relying on the final judgment in the federal action and the federal court's determination that the prior state-court judgment was res judicata, Petitioner below filed a motion for judgment on the pleadings as to Real Parties' last remaining cross-complaint for the recovery of attorneys' fees from Petitioner. Petitioner's motion asserted that the doctrines of res judicata and collateral estoppel precluded Real Parties from maintaining that action. The trial court, however, refused to accord the federal-court judgment full faith and credit and denied Petitioner's motion for judgment on the pleadings. The California Court of Appeal, Second District, Division Three, summarily denied Petitioner's Petition for Writ of Mandate, again refusing to give preclusive effect to the federal-court judgment under the principles of full faith credit. The Supreme Court of the State of California denied petitioner's petition for review after judgment by the California Court of Appeal once again refusing to give preclusive affect to the federal court's judgment.

Petitioner respectfully submits that the facts of this case give rise to a novel and important question of law

that concerns the administration of justice as between the federal and state systems. The decisions below by the California courts seriously undermine the principles embodied in full faith and credit and deny Petitioner the benefit of the doctrine of res judicata. Consequently, Petitioner seeks an order granting certiorari to review the order of the California Supreme Court.

B. Statement of Facts

Petitioner is the defendant in an action entitled *American Home Assurance Co. v. Leonard M. Ross, et al.*, Case No. C 511 991, consolidated with Case No. C 542 450 (the "Action"), which is currently pending in the Los Angeles County Superior Court.

Petitioner's former attorneys, now designated the plaintiffs in this Action, are named in this petition as real parties in interest. Real Parties represented Petitioner, beginning in or about 1979, in a series of civil actions brought against Petitioner as well as in certain related litigation between Petitioner and various insurance carriers. Real Parties' representation of Petitioner ceased in the summer of 1984.

Real Parties then filed a lawsuit in federal court and two separate cross-complaints in this Action in which they asserted, under various legal theories, the same alleged right to recover attorneys' fees from Petitioner. Real Parties first asserted this alleged right by filing a cross-complaint in this Action on or about August 19, 1985. This cross-complaint for attorneys' fees, which was amended on or about March 18, 1986, will be referred to as the "First State Cross-Complaint."¹

¹ The First State Cross-Complaint for attorneys' fees, which is ostensibly based on theories of breach of contract and quantum meruit (causes of action for fraud and constructive trust were eliminated by motion for judgment on the pleadings on December 1, 1986), describes the right to be adjudicated as follows:

On May 25, 1986, Real Parties filed a second cross-complaint in this Action against Petitioner (as well as several insurance companies) whereby Real Parties alleged the same right to recover attorneys' fees from Petitioner. This second cross-complaint for attorneys' fees, amended by Real Parties on December 1, 1986, will be referred to as the "Second State Cross-Complaint."²

"4. As a consequence of ROSS being named as a defendant in twenty three (23) civil actions (collectively referred to herein as the "underlying actions"), ROSS retained LYNN BOYD STITES and STITES PROFESSIONAL LAW CORPORATION to defend him therein. ROSS also tendered defense of these cases to numerous insurance carriers

5. Many of the insurance companies failed to properly respond to ROSS' requests for a defense or agree to defend him as required under the policies and California law. Consequently(ROSS retained LYNN BOYD STITES and STITES PROFESSIONAL LAW CORPORATION to file actions against each of the insurance companies . . . [and] to represent him and pursue bad faith litigation in other actions filed by other insurance companies. . . .

6. With respect to the insurance actions, ROSS and STITES agreed that STITES' consideration for prosecuting them would be a fifty percent (50%) contingency fee; the agreement was later modified to a forty percent (40%) contingency fee, plus costs. The agreement required that STITES was to receive his payments directly from the proceeds of any settlement or judgment with the insurance carriers. This First Amended Cross-Complaint only seeks recovery of fees for these insurance cases, plus fees for the *Fireman's Fund* litigation."

² The right sought to be adjudicated in the Second State Cross-Complaint, which was ostensibly based on a theory of intentional interference with prospective economic advantage, was ultimately described by the Second Appellate District as follows:

"The [Second State Cross-Complaint] alleges that Ross retained Stites to represent him in various actions, primarily bad faith litigation against numerous insurance companies. Pursuant to a retainer agreement, Stites was to receive as his fee 40% of any recovery from the insurance carriers.

[Continued]

On July 2, 1986, about one month after the Second State Cross-Complaint was originally filed, Real Parties *for the third time* asserted the same alleged right to recover attorneys' fees from Petitioner, this time by filing an action against Petitioner in the United States District Court for the Central District of California (the "Federal Action").³ On October 15, 1986, the United

² [Continued]

Ross discharged Stites as his attorney of record in the summer of 1984 and subsequently settled his claims with some or all of the insurance companies. . . .

. . . The complaint concludes with the allegation that '[t]he failure of each of the Insurers and ROSS to make the payment to STITES as required have actually disrupted the economic relationship between ROSS and STITES such that ROSS now has the use and benefit of all of the monies and STITES has not been paid any of it.'"

³ The Federal Action, which was ostensibly based on violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* ("RICO"), and a theory of common law fraud, described the right to be adjudicated as follows:

"12. During 1979, Plaintiffs and Defendants entered into an oral contingency fee agreement providing that Plaintiffs would be compensated on a contingency basis for pursuant claims, and filing litigation, against various insurance carriers whose policies insured the Defendant LEONARD M. ROSS. . . .

13. On or about 1978, 1979, and 1980, Plaintiffs and Defendants entered into oral contracts whereby Plaintiffs were employed by Defendants to render legal services for the representation of Defendants in the underlying actions alleged in the complaint brought by LEONARD M. ROSS before this Court, bearing case no. 85-0367-AHS (Px). . . .

15. In or about late 1983 and early 1984, the Defendants, and each of them, began to engage in a pattern of racketeering activities whose goal it was to deprive Plaintiffs of the defense fees earned through the defense of LEONARD M. ROSS in the underlying lawsuits, . . . to deprive Plaintiffs of attorneys' fees earned in defense of the underlying lawsuits, to deprive Plaintiffs of attorneys' fees earned and to be paid by American Home Assurance Company, and to deprive Plaintiff of attor-

States District Court ("U.S.D.C.") dismissed the Federal Action.⁴ Real Parties appealed the dismissal.

On January 5, 1987, Petitioner filed a general demurrer to the Second State Cross-Complaint which was sustained by the trial court with thirty days' leave to amend. Real Parties, however, failed to amend the Second State Cross-Complaint within the allotted time. Petitioner then filed a motion to dismiss the Second State Cross-Complaint with prejudice because Real Parties had failed to amend. On April 30, 1987, the trial court granted the motion and entered its judgment dismissing the Second State Cross-Complaint with prejudice as to Petitioner.

On June 26, 1987, Real Parties filed a Petition for Writ of Mandate in the Second Appellate District Court seeking review of the trial court's ruling on the Second State Cross-Complaint. On September 9, 1987, the Second Appellate District Court issued its "amended order granting alternative writ of mandate." In a written opinion dated January 13, 1988, the Second Appellate District Court unanimously denied Real Parties' Petition for Writ of Mandate and affirmed the judgment dismissing the Second State Cross-Complaint.

Because the Second Appellate District's decision affirming the dismissal of the Second State Cross-Complaint was handed down after the usual briefs had been sub-

neys' fees earned pursuant to the contingency fee agreement with regard to the claims and cases against insurance carriers.

29. Plaintiffs have been injured in their business as a direct result of ROSS' criminal activities by virtue of the fact that he has not been paid attorneys' fees for services rendered pursuing insurance carriers and in pursuing the underlying litigation on behalf of ROSS."

⁴ The U.S.D.C. held that the RICO cause of action failed to state a claim upon which relief could be granted, and that, as a result, the court had no jurisdiction to hear the pendent state-law fraud claim.

mitted in the appeal of the Federal Action, counsel for Petitioner submitted a copy of the Second Appellate District's decision to the Ninth Circuit Court of Appeals, which then ordered the parties to submit additional briefing on the following issues:

"1. Does 28 U.S.C. § 1738 require federal courts to give full faith and credit to the California Court of Appeals decision in *Stites v. Superior Court of the State of California for the County of Los Angeles*, consolidated nos. C511991 and C542450. . .

2. If federal courts must give full faith and credit to the state court decision, is this appeal barred by the doctrine of res judicata or collateral estoppel?"

On November 15, 1988, after the above issues were fully briefed and argued orally, the Ninth Circuit Court of Appeals unanimously affirmed the dismissal of the Federal Action, but on the grounds relied on by the U.S.D.C. to dismiss that action. Rather, the Ninth Circuit held that the decision of the Second Appellate District affirming the dismissal of the Second State Cross-Complaint operated as a res judicata bar to any claim by Real Parties for recovery of attorneys' fees from Petitioner. The Ninth Circuit reasoned:

"The record now reflects . . . that Stites previously sued Ross in California state court. The matter proceeded to final judgment against Stites on the merits in Superior Court, and the Court of Appeal affirmed in an unpublished disposition. Stites' action in that case was based upon the very same occurrences underlying his complaint in this case. The claim before us is therefore barred by the doctrine of res judicata." (Emphasis added.)

Petitioner then filed a motion for judgment on the pleadings in this Action seeking dismissal of Real Parties' First State Cross-Complaint based on the res judicata and collateral estoppel effect of the judgment rendered by the Ninth Circuit in the Federal Action. In this mo-

tion, Petitioner argued that the preclusive effect of the federal-court judgment had to be given full faith and credit by the State courts of California. Accordingly, Petitioner contended that Real Parties' First State Cross-Complaint, which asserted the same right to recover attorneys' fees as was asserted in the Federal Complaint and Second State Cross-Complaint, had to be dismissed as a matter of law.

On January 9, 1989, the Los Angeles County Superior Court denied Petitioner's motion for judgment on the pleadings. Petitioner's Petition for Writ of Mandate was summarily denied by the Second Appellate District on March 9, 1989. Petitioner's petition for review before the California Supreme Court was denied on May 3, 1989.

REASONS FOR GRANTING THE WRIT

I. The Federal Judgment Is Res Judicata And Must Be Accorded Full Faith And Credit By The California State Courts.

Under both California law and general principles of federal supremacy, California Courts are required to give full faith and credit to federal-court judgments. Such judgments have the same effect in the courts of this state as they would in federal court. *E.g., Levy v. Cohen*, 19 Cal.3d 165, 172-73, 137 Cal. Rptr. 162, cert. denied, 434 U.S. 833, 98 S.Ct. 119, 54 L.Ed.2d 94 (1977); *Martin v. Martin*, 2 Cal.3d 752, 761, 87 Cal.Rptr. 526 (1970); *Johnson v. American Airlines, Inc.*, 157 Cal.App.3d 427, 431, 203 Cal.Rptr. 638 (1984).

The requirement that the courts of this state accord full faith and credit to federal-court judgments is closely associated with the doctrine of res judicata. That doctrine gives conclusive effect to a former judgment in subsequent litigation involving the same controversy. "It seeks to curtail multiple litigation causing vexation and expense to the parties and wasted effort and expense in

judicial administration.” 7 B. Witkin, *California Procedure*, Judgement § 188, p. 621 (3d ed. 1985) (emphasis in the original); *see Busick v. Workmen’s Comp. Appeals Bd.*, 7 Cal. 3d 967, 972-973, 104 Cal.Rptr. 42 (1972). Moreover, the doctrine of res judicata is not merely a matter of practice or procedure. “Rather it is a rule of fundamental and substantial justice, ‘of public policy and private peace,’ which should be cordially regarded and enforced by the court.” *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 401, 101 S.Ct. 2424, 69 L.Ed 103 (1981) (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 61 L.Ed. 1148 (1917)).

Res judicata has two component parts. First, it precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. *Busick*, 7 Cal.3d at 973; Restatement (Second) of Judgments §§ 18, 19 (1982). The second aspect of res judicata, commonly referred to as collateral estoppel, precludes relitigation of those issues in the second action that were actually or necessarily litigated and determined in the first action. *Levy v. Cohen*, 19 Cal.3d at 171; *Bernhard v. Bank of America*, 19 Cal.2d 807, 813, 122 P.2d 892 (1942).

Under the principles of full faith and credit and the doctrine of res judicata, when a federal court renders a judgment that is entitled to res judicata or collateral estoppel effect, the courts of this state must accord that judgment the same preclusive effect that would be afforded that judgment in federal court. Moreover, under these same principles, a federal judgment is equally binding in the state court whether it was correct or erroneous.

As noted by this Court in *Federated Dept. Stores, Inc. v. Moitie*, the res judicata consequences of a final judgment on the merits are not altered by the fact that the judgment may have been wrong. “[A]n ‘erroneous con-

clusion' reached by the court in the first suit does not deprive the defendants in the second action 'of their right to rely upon the plea of *res judicata*.' " 452 U.S. at 398 (quoting *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325, 47 S.Ct. 600, 71 L.Ed 1069 (1927)).

Similarly, in California, it is well settled that an erroneous judgment is as conclusive as a correct one. *Panos v. Great Western Packing Co.*, 21 Cal.2d 636, 640, 134 P.2d 242 (1943). "Few principles of our law are better settled than that a *final* judgment, entered within a court's fundamental or subject matter jurisdiction, is conclusive, *whether or not it is erroneous. . .*" *People v. Cotton Belt Inc. Co.*, 143 Cal.App.3d 805, 808, 192 Cal. Rptr. 210 (1983) (emphasis in the original). In other words, a judgment is binding and conclusive though it is harsh, unjust, contrary to the evidence or based upon errors of law. 7 B. Witkin, *California Procedure*, Judgment § 219, p.655 (3d ed. 1985). The California courts have made it clear that any contrary rule would emasculate, if not wipe out, the doctrine of *res judicata*. *Zeppi v. State of California*, 203 Cal.App.2d 386, 388, 21 Cal. Rptr. 534 (1962).

In the instant case, the Court of Appeals for the Ninth Circuit, after full briefing and oral argument, held that the prior state-court judgment dismissing the Second State Cross-Complaint was *res judicata* and constituted a bar to any claim by Real Parties for the recovery of attorneys' fees from Petitioner. *The judgment in the Federal Action is a judgment on the merits that is now final.* Consequently, the federal-court judgment, in and of itself, is *res judicata*. That judgment, as well as the federal court's resolution of the *res judicata* issue, must be accorded full faith and credit by the courts of this state. The refusal by the trial court and the Second District Court of Appeal to give the federal-court judgment preclusive effect in these state-court proceedings not only allows relitigation of a controversy that has been

to have been fully and finally adjudicated by the federal court, but also constitutes an affront to the full faith and credit principles that govern the relationship between all courts in the United States.

A. *The Federal Judgment is a Final Judgment on the Merits.*

Under both California and federal law, a judgment that is final and on the merits is res judicata and will be given preclusive effect in a subsequent action which seeks to relitigate the same controversy. *Johnson v. American Airlines, Inc.*, 157 Cal.App.3d at 431.

In this case, the Ninth Circuit unanimously affirmed the dismissal of the Federal Complaint, but not on the grounds cited by the district court. Rather, the Ninth Circuit affirmed the dismissal because it determined that Real Parties' right to recover attorneys' fees from Petitioner had been finally adjudicated against them by the state court, and that under the principles of res judicata, Real Parties were barred from asserting the same right to recover attorneys' fees in the Federal Action.

When the appellate court affirms on grounds that differ from those relied upon by the lower court, the conclusiveness of the judgment as res judicata is governed by the appellate decision. 1B J. Moore, *Moore's Federal Practice* ¶ 0.416 [27] (2d ed. 1988); see Restatement (Second) of Judgments § 27 comment O (1982). Therefore, in the case at bar, it is the Ninth Circuit's opinion that determines the conclusive effect of the judgment in the Federal Action.

The Ninth Circuit, in holding that any claim by Real Parties for the recovery of attorneys' fees from Petitioner is barred by the absolute defense of res judicata, rendered a decision "on the merits," cf. *Ellingson v. Burlington Northern, Inc.*, 653 F.2d 1327, 1330 n.3 (9th

Cir. 1981), that is final.⁵ Consequently, the judgment in the Federal Action in and of itself is entitled to res judicata effect. 1B J. Moore, *supra*; see Restatement (Second) of Judgments, *supra*; 7 B. Witkin, *California Procedure*, Judgment § 207, p. 643 (3d ed. 1985) ("opinion of a reviewing court determining a question of law . . . may also be res judicata"); F.R.C.P. 41(b) (dismissal, other than for certain specific grounds, operates as an adjudication on the merits).

The issue of whether the dismissal of a federal action on res judicata grounds could itself constitute a res judicata bar to a subsequent state court action was recently considered, but not decided, by the Fifth Appellate District in *Takahashi v. Board of Education*, 202 Cal. App.3d 1464, 249 Cal.Rptr. 578 (1988), under facts very similar to those of the instant case. In *Takahashi*, a teacher discharged for incompetence brought her defenses before an administrative board whose function was to approve teacher discharges. The Board determined that the discharge was appropriate. The teacher then took a writ to the Superior Court and that court affirmed, entering a judgment on the appeal. The teacher thereafter filed suit in federal court on civil rights grounds. The federal court sustained defendants' motion for summary judgment on the ground that the prior state-court judgment was res judicata. The Ninth Circuit affirmed and certiorari was denied.

The teacher then brought another state court action which was subsequently dismissed on res judicata grounds. Although the Fifth District relied on the first state-court judgment for upholding the finding of a res judicata bar, it also recognized that the federal-court judgment, which dismissed the federal claims based on the preclusive effect of the existing final state-court judgment in the first action, itself could constitute a res

⁵ Real Parties made no effort to seek rehearing of the Ninth Circuit's decision or review by this Court.

judicata bar to plaintiff's state complaint. 202 Cal. App. 3d at 1486.

B. Because The First State Cross-Complaint Asserts the Same Primary Right as that Asserted in the Federal Complaint and the Second State Cross-Complaint, the Federal Judgment is Conclusive of the Parties Rights.

California law provides that the determination of whether the same causes of action are involved in both the earlier and subsequent litigation does not depend on the legal theory or label used, but on whether the "primary right" sought to be protected in the two actions is the same. *Johnson v. American Airlines, Inc.*, 157 Cal.App.3d at 432. In determining whether the same primary right is at stake, the significant factor is the harm suffered. *Slater v. Blackwood*, 15 Cal.3d 791, 795, 126 Cal.Rptr. 225 (1975). Moreover, as observed by the court in *Eichman v. Fotomat Corp.*, 147 Cal.App.3d 1170, 1174, 197 Cal.Rptr. 612 (1983), "if two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery."⁶

In this case, the Ninth Circuit held that the Federal Complaint and the Second State Cross-complaint asserted

⁶ The criteria utilized by the Ninth Circuit to determine whether successive lawsuits involve a single cause of action have been stated as follows:

"(1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the transactional nucleus of facts."

Constantini v. Trans World Airlines, 681 F.2d 1199, cert. denied, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed. 932 (1982) (emphasizing that the last of these criteria is the most important).

the same primary right—Real Parties' alleged right to recover attorney's fees from Petitioner for their representation of Petitioner in various lawsuits.⁷ The allegations of the First State Cross-Complaint readily demonstrate that the primary right sought to be adjudicated therein is *that very same primary right*—Real Parties' alleged right to recover attorneys' fees from Petitioner.

Indeed, a claim for the recovery of attorneys' fees describes only a single "wrong" meriting only one recovery, *regardless of the theory alleged*. See *Friedberg v. Cox*, 197 Cal.App.3d 381, 242 Cal.Rptr. 851 (1987). In *Friedberg*, the court stated as follows:

"Here, defendants' assertion in the action for attorney's fees of theories of joint venture and tortious interference with contract were aimed at remedying but one breach of primary right—the right of defendant Ingraham to a share of attorney's fees. Defendants' various theories of recovery were '... merely different legal theories of the nature of the single wrong' Thus, if Ingraham had sued to recover attorney's fees solely on the theory of, e.g., quantum meruit and the matter had gone to final judgment, a later action to recover attorney's fees based on joint venture or tortious interference with contract would be foreclosed by the doctrine of res judicata."

Id. at 388 (citations omitted).

The reasoning of the *Friedberg* court is equally applicable to the instant case. The use of different legal theories by Real Parties in their First State Cross-Complaint to assert the same primary right that was asserted in the Federal Complaint and the Second State

⁷ Even though the claims asserted in the Federal Complaint were broader than the claims asserted in the Second State Cross-Complaint, the Ninth Circuit held that both actions asserted the same primary right.

Cross-Complaint—their claim for attorneys' fees—cannot save them from a res judicata bar. Indeed, as held by the Ninth Circuit, “[t]he res judicata bar found here operates against *any* claim based on [Petitioner's] liability for the loss of [Real Parties'] professional fees for representing [Petitioner].” (emphasis added).)

Because the Federal Action resulted in a final judgment on the merits in favor of Petitioner, and involved the same parties and the same primary right, it is conclusive of the parties' rights and entitled to res judicata effect.⁸ The principles of full faith and credit require the state courts to give the federal judgment the same preclusive effect in these proceedings, even if that judgment was erroneously decided.⁹

II. Full Faith And Credit Requires The State Courts To Give The Federal Court's Resolution Of The Res Judicata Issue Preclusive Effect.

Before affirming the dismissal of the Federal Complaint, the Ninth Circuit specifically requested additional briefing on the issue of the res judicata effect of the Second Appellate District's prior decision. After considering the parties' briefs and oral arguments on this issue, the Ninth Circuit held that the decision of the Second Appellate District affirming the dismissal of the Second State Cross-Complaint was res judicata and operated as a bar to any claim against Petitioner for the recovery of

⁸ There can be no doubt that a federal court applying the criteria utilized by the Ninth Circuit for determining whether successive lawsuits involve the same cause of action, *see* n.6, *supra*, would reach the same conclusion.

⁹ This is so even though the First State Cross-Complaint was filed prior to the Federal Complaint. *Baughman v. State Farm Auto. Ins. Co.*, 148 Cal.App.3d 621, 624-25, 196 Cal.Rptr. 35 (1983) (“[w]here two actions involving the same issue are pending at the same time, it is not the final judgment in the first suit, but the first final judgment . . . that renders the issue res judicata in the other court”).

attorney's fees.¹⁰ In reaching its decision, the Ninth Circuit necessarily held that the prior judgment of this court was a final judgment on the merits.

Under the doctrine of collateral estoppel, the first judgment operates as an estoppel or conclusive adjudication as to those issues in the second action that were actually litigated or necessarily determined in the first action. *Frommhagen v. Board of Santa Cruz County*, 197 Cal.App.3d 1292, 1301, 243 Cal.Rptr. 390 (1987). In this case, even if the federal court erroneously held that the prior state-court judgment was a final judgment on the merits entitled to res judicata effect, the principles of full faith and credit require that the state courts give the federal judgment, and particularly, the federal court's resolution of the res judicata issue, preclusive effect. *Panos v. Great Western Packing Co.*, 21 Cal. 2d 636, 640, 134 P.2d 242 (1943); see also, *Beverly Hills v. National Bank of Glynn*, 16 Cal.App.3d 274, 286, 93 Cal.Rptr. 907 (1971). The judgment in the Federal action concerning the res judicata effect of the prior state-court judgment, regardless of whether it was right or wrong, is binding on the state courts as a matter of law. Consequently, Real Parties' First State Cross-Complaint is barred by the doctrine of res judicata.

¹⁰ Real Parties, in their brief and oral presentation to the Ninth Circuit, specifically argued that the Second Appellate District's prior decision addressed only the narrow issue of whether Real Parties had stated a claim for interference by Petitioner in the alleged relationship between Real Parties and Petitioner's insurance companies. This argument, however, was clearly rejected by the Ninth Circuit. The fact that the Second Appellate District framed the issue narrowly in its prior decision could not (and did not) prevent the Ninth Circuit from concluding that, as a matter of law, that decision was res judicata with respect to any pleading asserting the same primary right—Real Parties' alleged right to recover attorneys' fees from Petitioner.

CONCLUSION

For all the foregoing reasons, the petition should be granted.

Respectfully submitted,

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Dated: July 31, 1989

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 86-6604
D.C. #CV-86-4382-AHS

LYNN BOYD STITES and
STITES PROFESSIONAL LAW CORPORATION,
Plaintiffs-Appellants,

v.

LEONARD M. ROSS; ROSSCO INCORPORATED;
ROSSCO INNS CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Alicemarie H. Stotler, District Judge, Presiding
Argued and Submitted October 5, 1988
San Francisco, California

MEMORANDUM *

[Filed Nov. 15, 1988]

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Before: SCHROEDER, ALARCON and NORRIS, Circuit Judges.

This is an appeal from the district court's dismissal of plaintiff-appellant Stites' action. Stites sought to recover damages allegedly arising out of his legal representation of appellee Ross in certain insurance matters and Ross' termination of that representation. Stites attempted to set forth a cause of action for civil liability under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 (1982 & Supp. IV 1986) ("RICO"). The district court dismissed the action as failing to state a claim upon which relief could be granted, and Stites appeals, claiming he should have been given leave to amend his complaint.

The record now reflects, however, that Stites previously sued Ross in California state court. The matter proceeded to final judgment against Stites on the merits in Superior Court, and the Court of Appeal affirmed in an unpublished disposition. Stites' action in that case was based upon the very same occurrences underlying his complaint in this case. The claim before us is therefore barred by the doctrine of res judicata.

The California state decision is given the same preclusive effect in federal court it would be given in the California state courts. See 28 U.S.C. § 1738 (1982); *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). The California decision was unpublished. Unpublished decisions in California have no precedential value; however, they may be used to apply to doctrines of res judicata, collateral estoppel, and law of the case. Cal. R. Ct. 877.

In determining the scope of the prior cause of action for res judicata purposes, the federal courts apply California's "primary right" theory. *Takahashi v. Board of Trustees*, 783 F.2d 848, 851 (9th Cir.), cert. denied, 476

U.S. 1182 (1986). The significant factor in determining whether the identical primary right is at stake in both cases is to look at the harm suffered. *Id.* In *Takahashi*, a school teacher using California state law theories lost her California state court action for review of a school board's incompetency determination. She then attempted to bring a federal court action regarding the same occurrences using federal statutory and constitutional theories. The court found that the primary right at stake in both cases was plaintiff's alleged right to employment. *Id.* "While stating the primary right asserted in her first action in constitutional terms, *Takahashi* has failed to allege a new injury. 'Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim of relief.'" *Id.*, quoting *Slater v. Blackwood*, 15 Cal.3d 791, 126 Cal. Rptr. 225, 543 P.2d 593 (1975). See also *Los Angeles Branch NAACP v. Los Angeles Unified School Dist.*, 750 F.2d 731 (9th Cir. 1984), cert. denied, 474 U.S. 247 (1985).

As in *Takahashi*, plaintiff here has attempted to bring a new cause of action regarding the same primary right litigated to final judgment in state-court—his right to recover attorney's fees from Ross. The use of a new legal theory cannot save him from a res judicata bar. *See id.*; *see also* Restatement, Second, Judgments § 25 (1980). He could and should have brought his RICO claim in his state court case. *See Cianci v. Superior Court*, 40 Cal.3d 902, 221 Cal. Rptr. 575, 710 P.2d 375 (1985).

Stites points out that he has named as defendants in this case, in addition to Ross, two business corporations Ross allegedly controls. He asserts that the California judgment does not in and of itself bar an action against the business corporations as they were not parties to it. However, remand of the case to permit an attempt to state a claim against the corporations would be fruitless. It has not been suggested that the corporations had any-

thing to do with the events giving rise to the cause of action. No liability of the corporations could be established without first establishing the liability of Mr. Ross individually. The res judicata bar found here operates against any claim based on Ross' liability for the loss of Stites' professional fees for representing Ross.

The district court's dismissal of the action is AFFIRMED.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
2ND DISTRICT, DIVISON 3
IN BANK

No. B040231
S009432

LEONARD M. ROSS,
Petitioner,
v.

SUPERIOR COURT OF THE COUNTY OF LOS ANGELES,
Respondent;

LYNN B. STITES, *et al.*,
Real Parties in Interest.

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed May 3, 1989]

Petition for review DENIED.

/s/ Lucas
Chief Justice

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

B 040231

(Super. Ct. No. C 511991 consol. with C 542450
Hon. Norman L. Epstein)

LEONARD M. ROSS,

Petitioner,

vs.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,
Respondent;

LYNN B. STITES and
STITES PROFESSIONAL LAW CORPORATION,
Real Parties in Interest.

ORDER

[Filed Mar. —, 1989]

THE COURT:

The petition for writ of prohibition or mandate, filed February 23, 1989, has been read and considered. Our opinion filed January 13, 1988, concerned only real parties' contention that they had stated a cause of action for tortious interference with prospective economic advantage. The opinion did not concern real parties' other pleaded theories for recovering legal fees. Petitioner is not in a position to assert otherwise, having argued to this court, in opposition to the writ petition, that "The March 18 first amended cross-complaint [for breach of contract and quantum meruit] [is] not before this Court

on this petition. . . . [¶] Denial of the petition will not deprive petitioners of their right to seek the reasonable value of their services, as there still remains in the respondent court a cross-complaint by petitioners against real party for quantum meruit. . . . [¶] [The sustaining of the demurrer] did not deprive petitioners of the right to seek recovery from real party of what they claim is the reasonable value of their legal services. . . . [¶] Petitioners should only be allowed to pursue their quantum meruit claim now pending in the respondent court."

The petition is denied.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF LOS ANGELES

Dept. 44

C511991

HONORABLE NORMAN L. EPSTEIN, JUDGE

AMERICAN HOME ASSURANCE CO.,

vs

LEONARD M ROSS, *et al.*

170.6 FOSTER

MOTION OF DEFENDANTS, CROSS-DEFENDANTS
AND CROSS-COMPLAINANTS LYNN BOYD STITES
AND STITES PROFESSIONAL LAW CORPORATION
FOR LEAVE TO FILE THIRD AMENDED
CROSS-COMPLAINT

01/09/89

Deny. There is no declaration or compliance with LDPM
231; no showing of need or injustice if motion were de-
nied; and no justification to move this antique litigation
back to the pleading stage.

MOTION OF DEFENDANT LEONARD M ROSS,
FOR JUDGMENT ON THE PLEADINGS

Deny. The existing 1st Amended Cross-Complaint seeks
recovery of attorney fees on theories of breach of con-
tract and quantum meruit, and which alleges an over-
lapping theory of fraud. The 2nd Amended Cross-
Complaint alleged an interference theory against Ross.

A dismissal of that cross-complaint was issued after Stites failed to amend after a demurrer had been sustained. The Court of Appeal ultimately denied Stites application for mandate in an opinion based on a "narrow" issue concerning the tort of interference. The Ninth Circuit opinion affirming dismissal of Stites' RICO action is not a decision on the merits on fraud.

Notice by plaintiff.